IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	No. 16-259C
v.	)	Judge Sweeney
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

THE UNITED STATES' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The scope of the United States' obligation to make risk corridors payments in 2015 and 2016 extends only to the aggregate amount of collections, which Health Republic does not dispute HHS has paid out. As we explained in our Cross-Motion, Congress designed the risk corridors program—like the ACA's two other premium stabilization programs—to be self-funded. Nothing in section 1342 of the ACA requires the government to use taxpayer funds to make up shortfalls in "payments in" from insurers. Indeed, the parties agree that nothing in section 1342 or any other provision of the ACA appropriates funds or authorizes appropriations for risk corridors payments. Moreover, the CBO's estimate, on which Congress expressly relied in finding that the ACA would reduce the federal deficit, contained no indication that the risk corridors program would adversely affect the federal budget.

As enacted in 2010, section 1342 imposed no payment obligation on the United States, and no obligation could arise until 2015. And section 1342 was not Congress's last word on risk corridors. Beginning in 2014, before any obligation to make risk corridors payments could arise, Congress repeatedly has appropriated only risk corridors collections and it has expressly prohibited the use of other funds. Congress's express words of limitation and the uncontradicted legislative history of these Acts clearly show Congress's intent that the risk corridors program be self-funded and that taxpayer funds may not be used to make risk corridors payments.

As Health Republic would have it, a single phrase, "shall pay," included in the payment methodology paragraph of section 1342 is dispositive and this Court's jurisdictional holding has already determined the merits of the case. But this Court correctly recognized that its jurisdictional ruling did not determine, "on the merits, whether HHS is permitted to make partial annual risk corridors payments." *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 778 (2017).

Moreover, Health Republic is simply wrong on the law, and its simplistic reliance on the "shall pay" language in the payment methodology paragraph fails to establish a freestanding payment obligation. As recently as 2015, the Federal Circuit has held that money-mandating language in a statute such as the "shall pay" language upon which Health Republic stakes its entire case is not sufficient to create an obligation on the part of the government to provide for full payment. *Prairie Cty., Montana v. United States*, 782 F.3d 685 (Fed. Cir. 2015). Rather, the question is whether Congress intended to "impose[] a statutory obligation to pay the full amounts according to statutory formulas regardless of appropriations by Congress." *Id.* at 690. Indeed, when faced with a Tucker Act suit arising out of a shortfall or lack of appropriations, the rule has been uniform since the 19th Century. "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883) (giving effect to subsequently enacted appropriations law). Congress controls the power of the purse under the Constitution, which it exercises through statutes, including appropriations statutes. It is the duty of this Court to give effect to all of those statutes.

In enacting section 1342 and the appropriations laws, Congress did not create "chaos." *See* Pl. Opp'n Br. at 3, 23. Rather, Congress passed laws in the exercise of its Constitutional powers, expressly addressing section 1342 and the very payments Health Republic seeks. Congress designed section 1342 to be self-funded, and Congress appropriated only amounts collected from insurers. Health Republic's position falters because it badly mischaracterizes the relevant case law, especially *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), in which the Federal Circuit upheld an agency's pro-rata payments under a money-mandating statute that "entitled" claimants to payments according to a statutory formula where Congress did not appropriate sufficient funds to make full payments. Under *Highland Falls* and more than a century of Supreme Court precedent, Congress may choose to define the limits of a Government payment obligation through appropriations legislation, regardless of whether the permanent statute uses the phrase "subject to appropriations." Congress has so defined the extent of risk corridors payments here. The import of all of Congress's enactments concerning section 1342 admits one conclusion: the United States has no obligation to make full payments under the statutory formula when collections prove insufficient.

ARGUMENT

I. Section 1342 standing alone does not create a payment obligation on the part of the United States

Section 1342 directed HHS to "establish and administer a program of risk corridors" for the 2014, 2015, and 2016 calendar years "under which [insurers] shall participate in a payment adjustment system" which is "based on" a similar program under Medicare Part D. 42 U.S.C. § 18062(a). Subsection (b) of section 1342, the "payment methodology" provision, directed HHS to "provide under the program" that (1) if an insurer underpriced its premiums relative to costs, then HHS "shall pay" amounts at specified percentages, and (2) if an insurer overpriced its premiums relative to costs, then the insurer "shall pay" amounts at corresponding percentages. *Id.* § 18062(b)(1).

A. Section 1342(b)'s "shall pay" provision does not, standing alone, create an independent obligation to make risk corridors payments regardless of collections

Health Republic contends that the "shall pay" language in the payment methodology paragraph of section 1342 is sufficient, standing alone, to make risk corridors payments an obligation of the United States. Indeed, Health Republic contends that this Court already decided that issue when it rejected the government's jurisdictional arguments. *See, e.g.*, Pl. Opp'n Br. at 10 ("In short, this Court already held on the merits that Section 1342 is money-mandating. Unless

Congress somehow amended Section 1342 via an appropriations bill . . ., the failure to appropriate sufficient funds for risk corridors 'payments out' establishes this Court's jurisdiction and the basis for the Government's liability.").

Health Republic's error arises from its overly-literal reliance on a sentence from the en banc portion of *Fisher v. United States*, in which the Federal Circuit stated, "the determination that the source is money-mandating shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action." 402 F.3d 1167, 1173 (2005); *see* Pl. Opp'n Br. at 9-10. Thus, Health Republic cites a number of cases involving jurisdictional determinations to support its contentions that the money-mandating nature of section 1342 controls and appropriations are irrelevant to the determination that a source is money-mandating. *See* Pl. Opp'n Br. at 6 (citing *Agwiak v. United States*, 347 F.3d 1375 (Fed. Cir. 2003); *Slattery v. United States*, 635 F.3d 1298 (2011) (en banc)), at 10 (citing *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007); *Metz v. United States*, 466 F.3d 991 (Fed. Cir. 2006); *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563 (1997)), at 17 (citing *Agwiak*), at 19 (citing *Agwiak*; *Jackson v. Shinseki*, 526 Fed. App'x 947 (Fed. Cir. June 10, 2013) (unpublished); *Skinner v. Brown*, 27 F.3d 1571 (Fed. Cir. 1994)). None of these cases have any bearing on the merits question before this Court.[1]

[1] Health Republic's continued reliance on *Slattery* (Pl. Opp'n Br. at 6, 9-11) is inapposite. *Slattery* held that "(1) when a government agency is asserted to have breached an express or implied contract that it entered on behalf of the United States, there is Tucker Act jurisdiction of the cause unless such jurisdiction was explicitly withheld or withdrawn by statute, and (2) the jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid." 635 F.3d at 1321. These holdings are simply inapplicable to the issue presented. As the United States explained in its reply in support of its motion to dismiss (Dkt. #14 at 13), "[t]he Spending Laws themselves do not deprive this Court of jurisdiction." Moreover, *Slattery* is a decision addressing jurisdiction over breach of

Fisher itself makes clear that the initial determination that a plaintiff's cause of action rests on a money-mandating source is distinct from a determination whether the plaintiff's case "fit[s] within the scope of the source." 402 F.3d at 1175; *see also Metz*, 466 F.3d at 997 ("*Fisher* clearly states that the determination of whether a plaintiff's case fits within the scope of the source is properly raised under Fed. R. Civ. P. 12(b)(6), rather than Rule 12(b)(1)."). In the cases Health Republic relies on, Congress unquestionably had obligated the Government to make the payments sought; the question was whether the plaintiffs were eligible for those payments. *See Agwiak*, 347 F.3d at 1377-79 (considering eligibility of civil servants for per diem compensation and remote duty pay); *Metz*; 466 F.3d at 998-99 (eligibility of discharged service member for back pay under the Military Pay Act); *Adair*, 497 F.3d at 1251-58 (eligibility of federal prison employees for back pay, hazard pay, environmental hazard pay, and contributions to thrift savings accounts for exposure to second-hand smoke); *Jackson*, 526 Fed. App'x at 950-51 (eligibility of discharged service member for service connected disability payments); *Skinner*, 27 F.3d at 1572 (eligibility of survivor of Vietnam veteran for benefits under the Restored Entitlement Program for Survivors). Here, Health Republic's eligibility to receive risk corridors payments is not in dispute. It is the scope of section 1342 that is before the Court.[2]

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contract claims. It does not address the extent of an alleged statutory obligation or how an express restriction on appropriations can define an obligation. *Wetsel-Oviatt Lumber* also involved only breach of contract claims, 38 Fed. Cl. at 570-72, yet Health Republic repeatedly cites it in support of its contentions about the Government's alleged liability under a statute. *See* Pl. Opp'n Br. at 6, 10, 35.

[2] Although Health Republic also bases its claim on 45 C.F.R. § 153.510, the Court need only consider the scope of section 1342 because HHS would have had no authority to provide for payments beyond that authorized by Congress. *See* Gov't Br. at 34-36. Moreover, the Spending Laws, which provide budget authority only to the extent of risk corridors collections, are dispositive of the liability the regulations could create. *See GAO Red Book* 2-2, A182, ("A regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority.").

The Federal Circuit, moreover, has explicitly admonished that the existence of a money-mandating statute (the jurisdictional inquiry) should not be conflated with the merits. In *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007), the Federal Circuit rejected the contention that "whether a statute is money-mandating for purposes of Tucker Act jurisdiction depends on whether the plaintiff on the merits can make out a claim under the statute." *Id*. at 875. The Court explained that only after determining that a statute is money-mandating does the Court of Federal Claims "determine 'whether on the facts the plaintiff's claim falls within the terms of the statutes.'" *Id.* at 876 (quoting *Fisher*, 402 F.3d at 1172) (alterations omitted).

The Federal Circuit held that the Payment in Lieu of Taxes Act (PILT) was "reasonably amenable" to a reading that it is money-mandating because the Act provided that "the Secretary of the Interior *shall make a payment* for each fiscal year to each unit of general local government in which entitlement land is located as set forth in this chapter" and provided "a detailed mechanism for calculating these payments." 487 F.3d at 877 (citations omitted). But the Federal Circuit went on to reject the plaintiffs' claims on the merits, holding that the "PILT limits the government's liability to the amount appropriated." *Id*. at 878.

Consistent with the Federal Circuit's guidance, this Court correctly recognized in its jurisdictional opinion that the question "whether plaintiff was entitled to full payment" was a "remaining issue" that "will require the court to determine, on the merits, whether HHS is permitted to make partial annual risk corridors payments under section 1342." *Health Republic*, 129 Fed. Cl. at 778. Here, as in *Greenlee County* and the follow-on case, *Prairie County*, the text, structure, and legislative history of section 1342 show that the "shall pay" language in section 1342(b) does not establish "a statutory obligation to pay the full amounts according to statutory formulas regardless of appropriations by Congress." *Prairie Cty.*, 782 F.3d at 690.

In fact, the claim asserted here is even weaker than the claims alleged in *Greenlee County* and *Prairie County*. The PILT authorized appropriations, while limiting the scope of that authorization.[3] By contrast, the ACA does not authorize appropriations for risk corridors payments in the first place, nor does it provide any other budget authority for risk corridors payments. *See generally* 2 U.S.C. § 622(2) (defining four types of budget authority, none of which was granted in section 1342). Indeed, nothing in section 1342 suggests that taxpayer funds will be used to make risk corridors payments.

B. Congress designed section 1342 to be self-funded

As we explained in our Cross-Motion (at 14-15 & n.8), the ACA's omission of any appropriation or authorization of appropriations for risk corridors payments contrasts sharply with dozens of other provisions of the ACA for which Congress appropriated funds or enacted statutory language authorizing the appropriation of funds in the future. *See Land of Lincoln v. United States*, 129 Fed. Cl. 81, 104-05 (2016) ("Congress also provided appropriations or authorizations of funds for other programs within the Act, but it never has done so for the risk-corridors program.") (citing 42 U.S.C. §§ 18031(a)(1), 18054(i)), *appeal docketed*, 2017-1224 (Fed. Cir. Nov. 16, 2016).

Furthermore, the text of section 1342 contrasts sharply with the text of the Medicare Part D statute on which the risk corridors program was generally based. In the Medicare Part D statute, Congress provided "budget authority in advance of appropriations Acts" and stated that the statute "represents the obligation of the Secretary to provide for the payment of amounts provided." 42 U.S.C. § 1395w-115(a)(2). Congress did not make risk corridors payments an "obligation of

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[3] *See, e.g.*, *Prairie County*, 782 F.3d at 686 (explaining that the PILT provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter," but qualified that authorization by providing that "[a]mounts are available only as provided in appropriation laws").

the Secretary," even though it enacted similar language elsewhere in the ACA.[4] Instead, Congress directed HHS to administer a program under which "payments in" were the only potential source of funds from which to make "payments out."

Consistent with the plain text of section 1342, the contemporaneous scoring of the ACA that the Congressional Budget Office ("CBO") provided to Congress indicated that the risk corridors program would not adversely affect the federal budget. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate"), A81-A82. Congress specifically relied on the CBO Cost Estimate in the ACA in a provision that emphasized the Act's fiscal responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility"), A15-A16. In short, the text, structure, and history of section 1342 all demonstrate that the provision created a self-funded program of payment adjustments among insurers.

Health Republic concedes that neither section 1342 nor any other ACA provision makes an appropriation for risk corridors payments. Pl. Opp'n Br. at 14-15; *accord Health Republic*, 129 Fed. Cl. at 762. But Health Republic misunderstands the significance of the lack of an appropriation or other budget authority. Because the ACA did not appropriate funds for risk corridors payments or grant HHS authority to incur obligations for risk corridors payments, section 1342 alone did not permit HHS to make any risk corridors payments or to incur any financial obligations to make those payments without further congressional action. *See* 2 U.S.C. § 622(2) ("The term 'budget authority' means the authority provided by Federal law to incur financial

[4] *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided, "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph.")

obligations"). And indeed, by section 1342's terms, even with budget authority or an appropriation, HHS would have no obligation to make payments until 2015, after the insurers submitted their data from 2014. *See* Pl. Opp'n Br. at 38 n.15 (conceding that "[d]ue to data submission deadlines, risk corridor amounts for the 2016 plan year are not yet due."). Section 1342 does not contemplate funding other than its provision for "payments in," which, when collected, would constitute "user fees" that Congress generally appropriates to HHS in the CMS Program Management appropriation. *See* Gov't Br. at 7-11. In enacting section 1342, Congress thus reserved to itself full budgetary authority over the amount of risk corridors payments, and ensured that no liability would arise without subsequent appropriations legislation.

Health Republic underscores the weakness of its position when it argues, based on two veterans' benefits cases, that section 1342 gives insurers an "entitlement" to risk corridors payments. *See* Pl. Opp'n Br. at 18 (citing *Jackson*, 526 Fed. App'x at 950; *Skinner*, 27 F.3d at 1573). The veterans' benefits programs provided an explicit "entitlement" to veterans and their survivors in connection with past military service. *See Jackson*, 526 Fed. App'x at 950 (describing the "basic entitlement" program established by 38 U.S.C. § 1110 (entitled "Basic entitlement")); *Skinner*, 27 F.3d at 1572 (describing the "Restored Entitlement Program for Survivors"). The risk corridors program, in contrast, is not an "entitlement" program for insurers. It is a "payment adjustment system" among sophisticated insurance companies that is funded by "payments in." 42 U.S.C. § 18062(a). In light of the text and structure of section 1342 and Congress's exercise of its power of the purse to appropriate only "payments in" but barring the use of other funds, insurers are not statutorily entitled to any payments beyond their pro-rata share of collections.

II. Under the reasoning of the Federal Circuit's decision in *Highland Falls*, the Spending Laws definitively capped the government's liability for risk corridors payments at amounts appropriated

When the time came to appropriate funds for risk corridors payments, Congress directly spoke to the issue of risk corridors funding. Congress appropriated only "payments in" as part of the general appropriation of user fees to the CMS Program Management account, but expressly provided that "[n]one of the funds made available by this Act [for the CMS Program Management account] may be used for payments under section 1342(b)(1)." *See, e.g.*, Pub. L. No. 113-235, div. G, title II, § 227, 128 Stat. 2130, 2491 (2014), Gov't Br. Appendix A45. Congress has carried this restriction forward in continuing resolutions and appropriations laws to the present. *See, e.g.*, Pub. L. No. 114-53 § 101(a), 129 Stat. 502, 505 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title II, § 223, 131 Stat. 135 (re-enacting the same restriction in the appropriations law funding the Government for the remainder of fiscal year 2017), Reply Appendix attached to this brief, RA62. Health Republic cannot circumvent Congress's power of the purse by demanding billions of dollars that Congress did not appropriate.

As we explained in our Cross-Motion (at 22-23), the Federal Circuit's *Highland Falls* decision demonstrates that the United States is not liable for any shortfall between amounts calculated under section 1342 and the pro-rata payments HHS made out of the only funds Congress appropriated for that purpose. In attempting to distinguish this binding precedent, Health Republic has mischaracterized both the Federal Circuit's holding and the requirements of the statute at issue in *Highland Falls*.

A. The statute in *Highland Falls* was money-mandating

Highland Falls involved a school district's Tucker Act claim for payments under the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (1950), *codified, as amended, at* 20 U.S.C.

§§ 236-244 (1988 & Supp. V 1993),[5] for the years 1989 through 1993. 48 F.3d at 1167. The provision under which the plaintiff sought payment, 20 U.S.C. § 237, provided for federal assistance to school districts where the value of real property in the district acquired by the Government since 1938 exceeded 10 percent of the assessed value of all real property in the district, where the federal acquisition of land placed "a substantial and continuing financial burden on [the district]," and where certain other criteria were met. Districts determined by the Secretary of Education to meet the requirements for section 237 payments in a given fiscal year were "entitled to receive for such fiscal year such amount as, in the judgment of the Secretary, is equal to the [financial burden imposed on the district by the federal acquisition]." 20 U.S.C. § 237(a), RA3-4. Other sections of the Impact Aid Act provided assistance to school districts experiencing increased attendance by children of persons who reside and work on federal property, *id.* § 238, RA5, and by "sudden and substantial" increases in school attendance due to federal activities, *id.* § 239, RA16.

Health Republic is wrong to say that "*Highland Falls* does not deal with a money-mandating statute." Pl. Opp'n Br. at 33. As Health Republic acknowledges (at 33), the language it quotes from the Federal Circuit opinion was simply a description of the trial court's reasoning. The Federal Circuit, by contrast, recognized that the Impact Aid Act gave a school district an "entitlement" to federal payments. *See, e.g.*, *Highland Falls*, 48 F.3d at 1170 ("The 'precise question at issue' in this case is whether, in the face of underfunding by Congress, DOE erred in allocating funds **for § 237 entitlements** based upon the amounts earmarked for that section in the

[5] The Impact Aid Act was repealed in 1994 by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, title III, pt. C, § 331(b), 108 Stat. 3518, 3965. *See Highland Falls*, 48 F.3d at 1167 n.1. A copy of the Impact Aid Act analyzed by the Federal Circuit in *Highland Falls* is attached to this brief. *See* Reply Appendix ("RA") 1.

respective appropriations laws, instead of funding § 237 entitlements at 100% in accordance with § 240(c).") (emphasis added).

The Impact Aid Act provided that a school district "**shall be entitled to receive** . . . such amount as, in the judgment of the Secretary, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on [the school district] by [the Federal] acquisition of property." 20 U.S.C. § 237(a) (emphasis added). The phrase "in the judgment of the Secretary" did not render payments "discretionary"; it merely specified that the Secretary alone, rather than the Secretary and the school district together, made the payment determination. [6] And the Impact Aid Act "unequivocally state[d] that the Government 'shall' or 'will' pay certain amounts." Pl. Br. at 33. Section 240 required a school district "desiring to receive the payments to which it is entitled . . . under section 237" to submit an application, 20 U.S.C. § 240(a)(1), and provided that "[t]he Secretary **shall pay** to each [school district], rounded to the nearest whole dollar, making application pursuant to subsection (a) of this section, **the amount to which it is entitled under sections 237**, 238, and 239 of this title," 20 U.S.C. § 240(b)(1) (emphasis added), RA19. In other words, so long as a school district that lost tax revenue as a result of the acquisition of land by the Government made an application, the Impact Aid Act "entitled" the district to payment and provided that the Secretary "shall pay" the "amount to which [the school district] is entitled under section 237." *Id.* There is no doubt that *Highland Falls* involved a money-mandating statute. The Federal Circuit thus did not affirm the Court of Federal Claims' alternative jurisdictional holding, but rather affirmed the trial court's dismissal of

[6] Indeed, under *Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991), 20 U.S.C. § 237(a) is money-mandating because the Secretary had no discretion to refuse to make payments after determining that the criteria for payment were met. *See Fisher*, 402 F.3d at 1174-75.

the complaint on the merits "for failure to state a claim upon which relief could be granted." *Highland Falls*, 48 F.3d at 1170, 1172.

B. Despite the statute's provision that the Government "shall pay" amounts to which school districts were "entitled," the Federal Circuit upheld the agency's pro-rata payments which gave effect to the funding decisions of Congress

The Impact Aid Act included a provision for how the Secretary should allocate appropriated funds for payments under sections 237, 238, and 239, should Congress not appropriate sufficient funds to make 100 percent of payments under all three sections. Specifically, the statute provided that the Secretary "shall first allocate to each [school district] which is entitled to a payment under section 237 . . . an amount equal to 100 per centum of the amount to which it is entitled as computed under that section."[7] 20 U.S.C. § 240(c)(1)(A), RA20. After fully funding the payments under section 237, the Secretary was authorized to allocate funds pursuant to section 238 (children of persons who reside and work on federal property). 20 U.S.C. § 240(c)(1)(B) and (C), RA20, RA49.

In the years at issue in *Highland Falls*, Congress did not appropriate sufficient monies to fully fund Impact Aid Act entitlements. In lieu of appropriating a lump-sum amount for all of the Act's benefit programs, Congress allocated specific amounts for each program. For example, in fiscal year 1989, Congress appropriated $717 million for entitlements, $15 million of which was explicitly earmarked for "entitlements under section 2," *i.e.*, payments under 20 U.S.C. § 237(a). *Highland Falls*, 48 F.3d at 1170-71 (quoting Act of Sept. 20, 1988, Pub. L. No. 100-436, 102 Stat. 1680, 1701). In light of the underfunding by Congress, the Department of Education ("DOE")

[7] Congress had amended the allocation provision several times since 1950. *See, e.g.*, Act of Aug. 8, 1953, ch. 402, § 7, 67 Stat. 534-535 (proportionate allocation of available appropriations among the Sections 2, 3, and 4(a) programs); Act of Aug. 21, 1974, Pub. L. No. 93-380, § 5, 88 Stat. 484, 530-531 (tiered allocations of funds, with 25% of the funds being allocated in the first tier for the Sections 2 and 3 programs).

each year reduced payments under 20 U.S.C. § 237 such that the plaintiff "received . . . less than its § 237 entitlement." *Highland Falls*, 48 F.3d at 1169. The school district sued under the Tucker Act seeking the balance of payments it would have received if payments under section 237 were paid at 100 percent as section 240(c) required.

Although the Impact Aid Act explicitly gave priority to section 237 payments and directed the Secretary to pay 100% of those payments, the Federal Circuit upheld the agency's pro rata reductions of those payments. The Federal Circuit held that "DOE's approach [of reducing payments under 20 U.S.C. § 237] gave effect to the funding decisions of Congress, which earmarked specific amounts for § 237 entitlements," *id.* at 1171, and in following this approach, "DOE gave effect to the unambiguously expressed intent of Congress," *id.* at 1172 (internal quotation and alteration omitted). Accordingly, the school district could not state a claim under the Tucker Act for additional payments under 20 U.S.C. § 237.

The Federal Circuit's reasoning in *Highland Falls* cannot be reconciled with Health Republic's description of the law or any theory under which Health Republic could prevail. As noted above, the statute in *Highland Falls* "entitled" school districts to payments under a specific formula and provided that the Government "shall pay" the amounts specified. 20 U.S.C. §§ 237(a), 240(b). And the statute provided that, in the event of a shortfall in appropriations for all entitlements under the statute, the agency was to allocate funds sufficient to make 100 percent of the payments to which districts were "entitled" under section 237. Under Health Republic's reasoning, these statutory provisions should have entitled the plaintiff to a judgment in its favor, and Congress's insufficient appropriations should have been irrelevant to school districts' entitlement. But the Federal Circuit *began* its analysis with the appropriations acts for the years in which the plaintiffs sought payment. *Highland Falls*, 48 F.3d at 1170. The Court had "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue" that provided specific amounts for each section of the Impact Aid Act. *Id.* The Court noted that the agency "followed that mandate" of the appropriations acts by paying only the amounts appropriated. *Id.* at 1171. And the Court concluded that the agency's decision not to use other appropriated funds to make section 237 payments at 100 percent—as section 240(c) required—"was consistent with statutory requirements," including the Anti-Deficiency Act, 31 U.S.C. § 1341, and 31 U.S.C. § 1532, which permits transfers of appropriations from one account to another "only when authorized by law." *Highland Falls*, 48 F.3d at 1171.

The Federal Circuit explained that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective," *id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)), and concluded that "DOE's approach gave effect to both the provisions of the [Impact Aid] Act and the appropriations laws," *Highland Falls*, 48 F.3d at 1171. That is, when Congress provided a lump-sum appropriation for Impact Aid Act payments, the agency would first allocate funds under section 240(c) to make full payments under section 237. But when Congress earmarked specific appropriations for section 237 payments, the agency would reduce those payments pro-rata and not use other funds. *Id.*

Health Republic tries to distinguish *Highland Falls* by focusing on the specific provisions of 20 U.S.C. § 240(c) to argue that the issue in the case "was ***not*** whether the Government could underfund the program," but instead "whether DOE erred by not 'borrowing' funds from other Impact Aid programs pursuant to § 240(c) in order to make full payments under § 237." Pl. Opp'n Br. at 34 (emphasis original). Of course, there are no other funds for HHS to "borrow" to make risk corridors payments. *See Highland Falls*, 48 F.3d at 1171-72 (discussing 31 U.S.C. § 1532).

This attempted distinction, moreover, ignores the judgment that followed from the Federal Circuit's holding: *the Government was not liable to the plaintiff for the shortfall in payments*.

The same is true here. As explained, by enacting section 1342 and appropriating user fees each year as part of the CMS Program Management account, Congress provided that "payments in" under section 1342 would be used, once collected, to make risk corridors payments. Indeed, HHS identified only risk corridors collections as the source for payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), A134-A135. Section 1342 itself does not obligate the government to use taxpayer funds to make up for shortfalls in collections. And for each of the years at issue here, Congress has appropriated risk corridors collections, but specifically restricted the use of the CMS Program Management lump sum, the only other potential source of funds to support risk corridors payments that the GAO had identified. *See Dep't of Health & Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, *4-*5 (Sept. 30, 2014). In consistent, uncontradicted legislative history, Congress has made clear its intent that risk corridors payments shall not exceed collections. *See* 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014), A47; S. Rep. No. 114-74, at 12 (2015) (emphasis added), A57.

As we explained in our Cross-Motion (at 23), in light of Congress's funding decisions and the shortfall in risk corridors collections, HHS had no choice but to reduce risk corridors payments pro-rata to the extent of the shortfall. This approach requires neither an amendment nor a repeal of section 1342. Instead, HHS's implementation of the risk corridors program permits full payment of risk corridors amounts as calculated under the statute insofar as collections are available. Thus, HHS's implementation gives effect to section 1342, just as DOE's approach gave effect to 20 U.S.C. § 240(c) when Congress appropriated specific earmarked amounts for section

237. But just as with DOE's payment reductions in *Highland Falls*, when collections are insufficient, HHS's pro-rata risk corridors payments "g[i]ve effect to the funding decisions of Congress," 48 F.3d at 1171, and "the unambiguously expressed intent of Congress," *id.* at 1172, that only collections may be used to make risk corridors payments. And under *Highland Falls*, the United States is not liable for the shortfall in collections.

C. Congress may choose to define the scope of a payment obligation in an appropriations act regardless of whether the permanent legislation explicitly provided that payment was subject to the availability of appropriations

Health Republic tries to avoid numerous cases in which the United States was not liable, notwithstanding a money-mandating statute, by suggesting that the money-mandating statute must contain "additional language explicitly making payment contingent on available appropriations." Pl. Opp'n Br. at 7 & n.3, *see also id.* at 13-14 & n.6, 31-32 & n.13. Congress's power of the purse is not so constrained.

Greenlee County and *Prairie County* relied, in part, on a provision in the Payment in Lieu of Taxes Act that "[a]mounts are available only as provided in appropriations laws" to conclude that the Government's liability for payments was capped by the amounts appropriated by Congress for the years at issue. *See Prairie Cty.*, 782 F.3d at 690; *Greenlee Cty.*, 487 F.3d at 878. But as explained above, those limitations were included because the PILT Act authorized appropriations. Section 1342, by contrast, does not authorize any appropriations, nor does any other ACA provision authorize appropriations for risk corridors payments.

Moreover, *Highland Falls* belies Health Republic's contention that unless Congress explicitly makes liability subject to amounts appropriated, liability is uncapped. Indeed, *Highland Falls* is squarely to the contrary because the Impact Aid Act provided (without qualification) that school districts "shall be entitled" to receive specified payments and, in the event of a funding shortfall, required the government to pay 100 percent of the payments sought by the plaintiff. *See supra*. Nor did the statutes in *United States v. Will*, 449 U.S. 200 (1980), or *United States v. Dickerson*, 310 U.S. 554 (1940), contain any limiting language. Nonetheless, subsequent appropriations legislation was held to cap the government's liability in those cases.

In *Star-Glo*, the money-mandating provision was enacted as part of an appropriations bill, which also appropriated a specific amount for payments. *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1351 (Fed. Cir. 2005). The statute at issue was section 810 of the Act of October 28, 2000, Pub. L. No. 106-387, 114 Stat. 1549, 1549A-52, RA56. Subsection (a) provided that the Secretary of Agriculture "shall pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed . . . . Payments [to each grower] . . . shall be capped in accordance with [specified] trees per acre limitation." Subsection (e) provided that the Secretary "shall use $58,000,000 of the funds of the Commodity Credit Corporation to carry out this section to remain available until expended." RA57. The Federal Circuit concluded, after consideration of the legislative history, that Congress intended the Secretary of Agriculture to spend "not more than" the $58 million appropriated. *Star-Glo*, 414 F.3d at 1355. The spending limitation, however, was not phrased in terms of the plaintiffs' rights being subject to the availability of appropriations, but, as with risk corridors payments, in terms of the available funds the Secretary could use to make payments. Nothing in *Star-Glo* or any other case requires the limitation to be set forth in the same act as the money-mandating provision.

When considering a plaintiff's alleged right to payment, the touchstone is congressional intent as expressed in all of the statutes bearing on that alleged right. *Mitchell*, 109 U.S. at 150; *Highland Falls*, 48 F.3d at 1172. Here, Congress did not provide in section 1342 that taxpayer funds would be used to make risk corridors payments. In contrast to Medicare Part D and the dozens of other ACA provisions, Congress did not provide for appropriations at all in section 1342, nor did it provide budget authority for HHS to incur obligations to make payments. As we have explained, Congress designed section 1342 to be self-funded, and there was no reason for Congress to provide that risk corridors payments would be "subject to the availability of appropriations."

IV. The Court must enter judgment in favor of the United States to give effect to Congress's repeated, express restrictions on funding risk corridors payments

As set forth in our Cross-Motion and above, the United States' position—including HHS's implementation of the risk corridors program—gives effect to both section 1342 and express congressional action in the Spending Laws limiting risk corridors payments to collections. Health Republic provides no basis for the Court to disregard the full array of statutes enacted by Congress, so as to enter a money judgment for payments Congress never authorized.

A. The "repeal by implication" doctrine is inapposite

Health Republic argues that the Spending Laws did not "repeal Section 1342 by implication." Pl. Opp'n Br. at 26. The argument is a red herring because the "repeal-by-implication" rubric is inapplicable here. There is no dispute that section 1342 remains in effect. So long as collections are sufficient to make payments as calculated under the statute, HHS is authorized to pay them. But in the face of a shortfall, HHS must reduce payments to the level of collections, and the United States is not liable for the shortfall. *Highland Falls*, 48 F.3d at 1172.

The facts concerning congressional action regarding risk corridors payments are incontrovertible. To recap: in 2010, Congress did not appropriate funds for risk corridors payments in section 1342 or the ACA, *Health Republic*, 129 Fed. Cl. at 762, nor did Congress authorize appropriations or otherwise mention a source of funds for risk corridors payments other than a provision that insurers with relatively high premiums relative to costs will make "payments in" "under the program," 42 U.S.C. § 18062(b). *See also Land of Lincoln*, 129 Fed. Cl. at 105-06. In September 2014, the GAO, in response to an inquiry from Congress, identified only the CMS Program Management Appropriation, including both its lump-sum amount and its user fees appropriations, as a potential source of funding for risk corridors payments, provided Congress enacted identical appropriations language in future fiscal years when risk corridors payments would be made. In December 2014, before any risk corridors payments could conceivably be due or even calculated, Congress addressed risk corridors funding for the first time, providing that "[n]one of the funds made available by this Act [for the CMS Program Management lump sum appropriation] may be used for payments under section 1342(b)(1) of [the ACA]." 128 Stat. 2491.[8] Congress repeated this prohibition the following year, and repeated it again in the current omnibus appropriations act funding the government.

The clear import of this express language of restriction in these statutes is to limit risk corridors payments to risk corridors collections. The legislative history indicates nothing else. The 2015 Explanatory Statement—which the 2014 Spending Law provides shall have the same effect as a conference committee report—indicates that Congress understood that under HHS's implementation of the risk corridors program "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014), A47. Thus, Congress included the limitation "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." *Id.* In other words, Congress (1) clearly approved of HHS's budget-neutral implementation of the risk corridors program and (2) restricted the use of the only potential source

[8] Health Republic does not defend Judge Wheeler's erroneous conclusion that the fiscal year 2014 CMS Program Management appropriation was available for risk corridors payments. *See* Gov't Br. at 28-29 & n.13 (discussing *Moda*, 130 Fed. Cl. at 456-57 & n.13).

of taxpayer funds to ensure that only risk corridors collections could be used to fund risk corridors payments. The Senate Report accompanying the 2016 Spending Law stated that the limitation "prevented the administration from transferring . . . funds" and "require[d] the administration to operate the Risk Corridor program in a budget neutral manner." A57.

Whereas Congress provided no budget authority for risk corridors payments in section 1342 or elsewhere in the ACA, Congress spoke directly to the funding of risk corridors payments in the Spending Laws. In enacting the Spending Laws, Congress responded to the analysis in the GAO opinion, which identified only two potential funding sources—"payments in" and the lump-sum appropriation for program management—and did not suggest that risk corridors payments could be made from any other source. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the CMS Program Management account. Congress thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). As in *Highland Falls*, that "clear congressional mandate" precludes plaintiff's claim. 48 F.3d at 1171.

The facts here are nothing like the facts in *TVA v. Hill*, 437 U.S. 153 (1978), on which Health Republic relies. *See* Pl. Opp'n Br. at 24, 25. There, the question was whether Congress intended to repeal a provision of the Endangered Species Act when it appropriated funds for a dam. *TVA*, 437 at 156. But Congress did not address the Endangered Species Act—or even the dam itself—in the appropriations laws at issue. *Id.* at 189 & n.35. By contrast, Congress specifically addressed risk corridors funding and restricted the availability of the funding sources that the GAO's analysis identified as potentially available for risk corridors payments.

Nor do *Langston* and *New York Airways* provide any support for plaintiff's position. In *United States v. Langston*, the Court noted that "[r]epeals by implication are not favored," 118 U.S. 389, 393 (1886), and concluded that an appropriations law that "merely appropriated less" than an ambassador's specified salary and that "contained no words that expressly, or by clear implication, modified or repealed the previous law" did not evince an intent to reduce the salary, *id.* at 394. In *New York Airways*, the Court of Claims discussed *Langston*, but also noted that while Congress intended to "gradually eliminate" the subsidies at issue, Congress recognized that the statute providing for those subsidies created a judicially enforceable payment obligation in the Court of Claims. *New York Airways, Inc. v. United States*, 369 F.2d 749, 751 (Ct. Cl. 1966).

Here, Congress did not "merely appropriate[] less" because section 1342 does not "entitle" insurers to specified payments like the statute which "entitled" the Minister of Haiti to a salary of $7,500. And there was no "gradual elimination" or reduction in benefits from a prior year. Unlike the Minister to Haiti in *Langston* or the helicopter companies in *New York Airways*, insurers did not receive full payment of risk corridors without regard to collections for the years before the Spending Laws. Instead, collections are the only funds that Congress has ever appropriated for risk corridors payments. Moreover, Congress did not merely appropriate an insufficient sum for risk corridors payments; it used language of limitation: "[n]one of the funds" that are transferred to the lump-sum Program Management appropriation "may be used for payments under section 1342(b)(1)." *See, e.g.*, A45. The appropriations acts in *Langston* and *New York Airways* merely appropriated insufficient amounts; they had no analogous expression of specific congressional intent to restrict or limit the Government's obligations.

B. Congress limited any obligation to make risk corridors payments to the extent of collections

Even assuming that section 1342 would have obligated the Government to make full risk corridors payments regardless of collections, the restrictions in the Spending Laws clearly manifest an intent by Congress to limit the United States' obligation to the extent of collections. Health Republic characterizes Congress's restriction on risk corridors payments as a "mere limitation on the expenditure of a particular fund," which, according to Health Republic, is insufficient to "express a clear intent to modify [a] preexisting statutory obligation." Pl. Opp'n Br. at 25. But the manner in which Congress chooses to exercise its power of the purse is irrelevant; what matters—what the Court must give effect to—is congressional intent, here manifested in the laws it enacted.

Health Republic relies on *Gibney v. United States*, 114 Ct. Cl. 38 (1949), to support its assertion that a "mere limitation on the expenditure of a particular fund" is *per se* not enough to limit the United States' liability. *See* Pl. Opp'n Br. at 25, 26. *Gibney* does not stand for this rule, which is not the law.

First, the phrase Health Republic takes from *Gibney* relates to rules of the houses of Congress, not a holding of any court. Immediately following its description of the provision at issue as a "mere limitation on the expenditure of a particular fund," the court stated: "For more than half a century according to the rules and the practice prevailing in the Congress, a pure limitation in an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation . . . . I know of no departure from this rule in the enactment of legislation in the history of the Government." 114 Ct. Cl. at 50-51. But Congress is free to deviate from its own rules, and when it does courts "are bound to follow Congress's last word on the matter even in an appropriations law." *City of Los Angeles v. Adams*, 556 F.2d 40, 49 (1977).

Second, as explained in our Cross-Motion (at 32), *Gibney*'s discussion of whether the appropriations provision at issue amended the existing law is dicta. After the Court discussed *Dickerson*, which involved a limitation on the expenditure of a particular fund that was held to suspend a payment obligation, the court ultimately concluded that

> it is not necessary in this case to rest the decision on this point alone, since the [provision at issue] did not even purport to limit the funds in the appropriation bill in such a way as to prevent the payment [sought in the case].

Gibney, 114 Ct. Cl. at 53. The court went on to note that the provision's sponsor conceded on the floor of the Senate the following year that he was mistaken about the underlying law, and the provision was not enacted in the subsequent appropriations bill. *Id.* at 53-54. In short, *Gibney* is inapposite here.

Where Congress indicates "a broader purpose" beyond "something more than the mere omission to appropriate a sufficient sum," *United States v. Vulte*, 233 U.S. 509, 515 (1914), the Supreme Court and the Federal Circuit have had no difficulty giving effect to Congress's limitations on the expenditure of funds and concluding that the United States is not liable for payments in excess of those limitations. As we pointed out in our Cross-Motion (at 21), in *Will*, one of the appropriations laws at issue (fiscal year 1980, or "Year 4" in the Court's terminology) provided that "funds available for payment [to the plaintiff-judges] shall not be used to pay any sum in excess of 5.5 percent increase in existing pay." 449 U.S. at 208. The Court concluded, based in part on comparison with prior appropriations acts and the legislative history, that the provision limited the pay increase to which federal judges were entitled. *Id.* at 229-30. There is no meaningful difference between a statute providing that "funds . . . shall not be used," and a statute providing that "[n]one of the funds . . . shall be used." Under *Will*, the Spending Laws sufficiently evince congressional intent to limit any obligation to make risk corridors payments to the extent of collections.[9]

Similarly, where Congress has appropriated specific sums for payments under money-mandating statutes, as in *Highland Falls* and *Star-Glo*, the Federal Circuit has held that the United States is not liable for any shortfall between the appropriation and payments calculated under the statutory formula. In each case, the court concluded that Congress intended the specific sum appropriated to be the full extent of the Government's obligation. There is no reason to conclude that when Congress appropriates a specified sum it may intend to limit liability to that sum regardless of a statutory formula, but when, as here, Congress specifically *limits* available funds it nevertheless intends the Government to be obligated to pay whatever amount may be calculated. That conclusion would be all the more anomalous when the calculated payments that Congress intended to limit extend to billions of dollars.

Even if congressional intent behind the restrictions in the text of the Spending Laws were somehow unclear, the legislative history set forth above and in our Cross-Motion resolves all doubt, and courts have relied on legislative history to interpret appropriations acts since at least *Dickerson*. *See, e.g.*, *Dickerson*, 310 U.S. at 557-561; *Will*, 449 U.S. at 229-30; *Gibney*, 114 Ct. Cl. at 54; *New York Airways*, 369 F.2d at 751; *Star-Glo*, 414 F.3d at 1355. Moreover, the legislative history is uncontradicted and points only to an intent to limit risk corridors payments to

[9] Health Republic emphasizes that the other appropriations restrictions in *Will*, like the restrictions in *Dickerson*, 310 U.S. at 555-57, provided that no funds in those acts "or any other Act" could be used to make payments. Judge Wheeler relied on this language in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 462, *appeal docketed*, No. 2017-1994 (Fed. Cir. May 9, 2017), to conclude that Congress "left open" the Judgment Fund to provide for full payment of risk corridors payments. But Health Republic rightly concedes that the Judgment Fund cannot serve as a basis for determining liability, Pl. Opp'n Br. at 11-12. Health Republic identifies no other source of funds for risk corridors payments (there is none) and provides no explanation for the supposed significance of this "or any other Act" language.

collections. It thus contrasts starkly with the legislative history in *New York Airways*, 369 F.2d at 750-51, where it was "readily apparent" that "Congress was well-aware" that the government's existing "obligation to pay" was not affected by an appropriation, and in *District of Columbia v. United States*, where "all the court is able to conclude . . . is that Congress had every intention of fully funding the repairs and renovations." 67 Fed. Cl. 292, 336 (2005). Instead, it is closer to the Conference Report relied on by the Federal Circuit in *Star-Glo*, which indicated that in appropriating a specific sum of $58 million, Congress intended the Government to spend "not more than" the amount appropriated.

CONCLUSION

The Court should enter judgment in favor of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 2, 2017, a copy of the attached *United States' Reply in Support of its Cross-Motion for Summary Judgment* was served via the Court's CM/ECF system on Plaintiff's counsel, Stephen Andrew Swedlow.

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